No. 96-216 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

MICHAEL MAIETTA,

Petitioner,

against

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Whether a criminal defendant is entitled to a plenary hearing concerning the validity of a subsequent arrest, in breach of a plea agreement, which was used to enhance his sentence, where the defendant later, voluntarily and knowingly, pleaded guilty to that charge?

2. Whether petitioner's claim that he was entitled to an evidentiary hearing to determine whether a sentence-enhancing arrest was "valid," calls for the creation of a new rule of constitutional law, where existing precedent did not dictate such a ruling when petitioner's state appeals became final.

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STATEMENT OF THE CASE

The Plea and Sentence

On March 11, 1991, pursuant to a plea and sentence agreement, petitioner, in the Supreme Court of the State of New York, Bronx County, offered to plead guilty to Criminal Possession of Stolen Property in the Third Degree (New York Penal Law § 165.50), Attempted Burglary in the Third Degree (two counts)(New York Penal Law § 110/140.20), and Burglary in the Third Degree (New York Penal Law § 140.20), in full satisfaction of four separate indictments (PA. 48a-49a, 50a).[1] In return for his guilty plea, petitioner was promised an aggregate sentence of from four to eight years imprisonment, provided that petitioner was not arrested for any further crimes prior to sentence, that he appeared on the date of sentence, and that he cooperated with officials of the Department of Probation (Sheindlin, J.) (PA. 49a). The court specifically informed petitioner that if he violated any of these conditions, it would sentence him to the maximum permissible sentence of twenty-two years (PA. 49a).

At sentencing, the prosecutor submitted a copy of a Westchester County, New York indictment indicating that petitioner had been arrested and charged with committing a burglary "only weeks" after pleading guilty (PA. 68a). The prosecutor noted that the court "could not have been more clear as to the consequence for this defendant if he violated any of the conditions you set," and asked that the court fulfill its "alternative promise" (PA. 68a-70a).

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[1] Numerical references preceded by "PA." refer to petitioner's Appendix, and numerals preceded by "Pet." refer to the Petition for Writ of Certiorari.

Petitioner denied involvement in the Westchester crime, arguing that the Westchester arrest and indictment for burglary and related crimes involved a Jeep owned by petitioner but driven by another person (PA. 74a-75a). Defense counsel presented a "statement" by one Anthony Salveggi, in which he admitted that he, not petitioner, was the driver of the Jeep (PA. 74a-75a). Counsel argued that petitioner was identified as a perpetrator after a "20 second viewing in a fleeing truck" by a Yonkers police officer, who later saw petitioner's photograph after being told that petitioner was a known burglar (PA. 75a). Counsel also stated that he had three alibi witnesses for petitioner (PA. 75a).

After denying petitioner's applications to withdraw his plea and, alternatively, to be re-sentenced to four to eight years imprisonment if acquitted of the Westchester County charges, the court adhered to its admonishment at the plea proceeding and sentenced petitioner to an aggregate indeterminate term of imprisonment of from ten to twenty years (PA. 78a-79a). The court noted that "in this case not only was the defendant arrested but he was subsequently indicted so that there [was] an additional filter for the quality of the arrest, and not only was he arrested and not only was he indicted, but he was arrested and indicted for things that he does professionally, burglary" (PA. 81a-82a).

The Appeal to the Appellate Division, First Department

Affirming the judgment of conviction in an opinion entered December 24, 1991, the Appellate Division, First Department of New York State Supreme Court, held that petitioner knowingly and voluntarily pleaded guilty in return for a promised term of imprisonment, legally subject to enhancement when petitioner was rearrested prior to sentencing. *People v. Maietta*, 173

A.D.2d 17, 22-23, 578 N.Y.S.2d 529 (1st Dept. 1991)(PA. 36a-38a, 40a). The Court further ruled that petitioner waived any claim with respect to this condition since neither petitioner nor counsel objected to it during plea negotiation, and rejected the dissent's position that *nisi prius* was required, prior to enhancing petitioner's sentence, to conduct a hearing to resolve petitioner's claim that he was innocent of the new crime.

Disposition of the Westchester Charges

On March 23, 1992, petitioner was convicted, upon his plea of guilty, in County Court, Westchester County (Silverman, J.), of Burglary in the Second Degree (New York Penal Law § 140.25), Criminal Trespass in the Second Degree (Penal Law § 140.15), and Criminal Mischief in the Fourth Degree (Penal Law § 145.00), and sentenced to an indeterminate term of imprisonment of from five to ten years, to run concurrently with the ten to twenty year sentence imposed in this case (Pet. 5-6). Petitioner has never moved to withdraw his plea in Westchester and has not filed a notice of appeal from the Westchester conviction.

The Appeal to the New York Court of Appeals

On February 16, 1993, the New York State Court of Appeals rejected petitioner's claim that "when a defendant denies post-plea criminal conduct, the court must conduct an evidentiary hearing to satisfy itself by a preponderance of the evidence that the defendant has, in fact, committed the crime for which he was arrested." *People v. Outley*, 80 N.Y.2d 702, 712, 610 N.E.2d

356, 594 N.Y.S.2d 683 (1993)[2](PA. 28a). The Court held that, under such circumstances, "a court must conduct an inquiry at which the defendant has an opportunity to show that the arrest is without foundation." *Id.*

The Petition For A Writ Of Habeas Corpus

On March 9, 1994, petitioner filed a petition seeking federal habeas relief arguing that the state trial court should have conducted a plenary hearing concerning the validity of the Westchester arrest. In a memorandum and order entered on August 22, 1995, United States District Judge Lawrence M. McKenna for the Southern District of New York, noted that, under these circumstances, New York State simply required "an inquiry at which the sentencing court must satisfy itself that there exists a legitimate basis for" a subsequent arrest where the plea agreement contained a "no-arrest" condition (PA. 9a-10a). The district court concluded that in order for it to grant the relief sought by petitioner, it "would have to go further" and require a hearing which would call for the announcement and application of a "new rule" (PA. 10a-11a). This "new rule," however, did not fall within one of the two recognized exceptions permitting retroactive application (PA. 11a-12a). Accordingly, the petition was dismissed (PA. 13a).

On October 17, 1995, the District Court granted a certificate of probable cause (PA. 15a-16a).

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[2]Petitioner's case was decided together with two other cases, the first of which was *People v. Outley*.

The Decision of the United States Court of Appeals for the Second Circuit

On May 15, 1996, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. The Court held that "[t]he precise issue" was "whether a guilty plea forecloses a challenge to the validity of an arrest under circumstances where not being arrested is a condition of a plea agreement governing sentencing on an unrelated charge" (PA. 2a). In apparent *dicta*, the Court noted that the doctrine of collateral estoppel had been applied from one criminal proceeding to another "for the benefit of the accused" but whether it could be applied against the accused had divided the few circuit courts of appeals that had addressed the issue. The Second Circuit, however, specifically did not consider the latter issue, since petitioner's plea of guilty to the Westchester charges precluded a "challenge to the validity of an arrest that is used only for purposes of sentencing in a different criminal case" (PA. 6a).

SUMMARY OF THE ARGUMENT

1. Petitioner's argument, that the Second Circuit's decision presents a "split among the circuits" regarding the application of the doctrine of collateral estoppel in criminal cases, is without support in the record. The Second Circuit did not decide that issue since it found that the prior conviction was not being utilized to adjudicate guilt.

2. Petitioner's claim, that the District Court's decision presents this Court with an opportunity to clarify its decision in *Teague v. Lane*, 489 U.S. 288 (1989) is also without support in the record. Petitioner fails to state how *Teague* is unclear, and, in any event, the Second Circuit did not affirm the dismissal of the petition on the basis of *Teague*. Accordingly, there is no direct and apparent conflict between this Court's decision in *Teague* and a decision of a federal court of appeals.

REASONS FOR DENYING THE WRIT

POINT I

Petitioner fails to demonstrate that the Circuit Court's decision presents a question of public importance or that its decision is in conflict with any decision by this Court or any other Federal Court

The record does not support petitioner's claim the Second Circuit's decision creates a split among the circuits regarding whether due process bars the offensive use of collateral estoppel against criminal defendants.

The Second Circuit framed "[t]he precise issue" for review (PA. 2) as whether petitioner's plea of guilty to the Westchester charge "precludes his challenge to the validity of his arrest on the charge, at least for the limited purpose of determining his breach of the plea agreement governing the Bronx charges" (PA. 5a). Although the Second Circuit noted in *dicta* that the issue of whether the doctrine of collateral estoppel could be applied from one criminal proceeding to another "*against* the accused has divided the few courts of appeal that have considered the question. . . " (PA. 5a)(emphasis in original),[3] it specifically

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[3]The Second Circuit noted that the split in authority involves criminal prosecutions in which the former conduct was used to determine guilt or innocence. *See Hernandez-Uribe v. United States*, 515 F.2d 20, 21 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976)(plea of guilty in a prior criminal proceeding admissible to prove all essential elements of the offense charged in subsequent proceeding); *Pena-Cabanillas v. United States*, 394 F.2d 785, 787 (9th Cir. 1968)(same); *United States v. Pellulo*, 14 F.3d 881 (3d Cir. 1994)(a prior conviction after a jury trial could not be introduced against the

(continued...)

ruled that it "need not decide whether a fact necessarily found adversely to a criminal defendant has collateral estoppel effect in a subsequent jury trial of a criminal case, because in the pending case the issue is whether the defendant's conviction precludes this challenge to the validity of an arrest that is used only for purposes of sentencing in a different criminal case" (PA. 6a).

Since the instant petition does not involve the use of a prior conviction to determine guilt or innocence, the issue petitioner presents for review is not supported by the record and should not be considered by the Court. *See Sommerville v. United States*, 376 U.S. 909 (1964)(writ of certiorari denied despite conflict between state and federal law since the split was irrelevant to the resolution of the controversy presented by petitioner); *see also Watson v. Buck*, 313 U.S. 387, 402 (1941)(it is not the business of this Court to issue advisory opinions to clarify points that have no bearing to the particular facts of a case before it).

Here, the state courts found that petitioner waived any claim concerning the validity of the arrest by pleading guilty to the Westchester charges. Petitioner's real claim, as presented throughout the litigation of this case, is that the Bronx County Supreme Court was required to conduct a plenary hearing on the validity of the new Westchester arrest before enhancing his sentence, even though a Grand Jury in Westchester County found legally sufficient evidence to indict, and he later pleaded guilty in open court. *See* New York Criminal Procedure Law § 190.65; *People v. Mikuszewski*, 73 N.Y.2d 407, 411, 538 N.E.2d 1017, 541 N.Y.S.2d 196 (1993)("A Grand Jury may indict only

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[3](...continued)
defendant to establish a fact in a subsequent trial by jury); *see also United States v. Colacucio*, 514 F.2d 1 (9th Cir. 1975)(Pet. p. 11, fn. 10).

if the evidence before it is legally sufficient to establish that the defendant committed the offense charged"). Under these circumstances, due process does not require a full evidentiary hearing to determine the validity of a sentence because petitioner was informed of the circumstance considered in enhancing the sentence and both he and his attorney were then given the opportunity to controvert it. *See Williams v. New York*, 337 U.S. 241, 252 (1948). "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure" *Williams v. New York*, 377 U.S. at 251. It also does not "implicate the entire panoply of criminal trial procedural rights." *Gardner v. Florida*, 430 U.S. 349, 358, n. 9 (1977).

Relying on *Lonchar v. Thomas*, ___U.S.___, 116 S.Ct. 1293 (1996), petitioner next alleges that he was denied his "right to appeal the denial of a writ of habeas corpus" (Pet. 14) because the Circuit never reached the merits of the claim (Pet. 13). Petitioner's reliance on *Lonchar* is entirely misplaced. In *Lonchar*, this Court considered the very specific and narrow issue of "whether a federal court," in a capital case, "may dismiss a first federal habeas petition for general 'equitable' reasons beyond those embodied in relevant statutes, Federal Habeas Corpus Rules, and prior precedents." *Lonchar*, 116 S.Ct. at 1295. This Court ruled that a Circuit Court could only dismiss a petition or render it moot on the basis of procedural rules embodied in the federal habeas statutes and not on general "equitable" procedural rules promulgated by that court. Here, by contrast, the Circuit did not rely on a "procedural" rule to dismiss the petition. Rather, it reached the merits of whether petitioner's sentence was improperly enhanced, and held that petitioner's guilty plea precluded a challenge to the validity of an arrest used to enhance a sentence.

POINT II

The Second Circuit's decision affirmed the District Court's dismissal of the petition on different grounds and, therefore, does not present any issue of public importance or any conflict with any decision of this Court or any other Federal Court

The record does not support petitioner's argument that the rule of *Teague v. Lane*, 489 U.S. 288 (1989), permits review of his claim that his sentence was invalidly enhanced because the Second Circuit did not decide this case on the basis of *Teague*. Therefore, there is no need for the Court to clarify its ruling in *Teague*. This Court is vested with the task of achieving uniformity in federal matters among courts whose decisions are final, absent review by this Court, and, since a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law," review of petitioner's present claim must be denied. Supreme Court Rules, Rule 10(a)-(c); *Magnum Co. v. Coty,* 262 U.S. 159, 163 (1923)("The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing").

In any event, denial of the petition is proper because a plenary evidentiary hearing to determine the validity of his arrest calls for the creation of a "new rule" of constitutional law in contravention of the principles announced by this Court in *Teague v. Lane*, 489 U.S. at 301. *See also Gilmore v. Taylor*, 500 U.S. 333 (1993). A holding constitutes a "new rule" if it "breaks new ground, . . . imposes a new obligation on the States or the Federal Government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final."

Teague v. Lane, 489 U.S. at 301 (emphasis in original). Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two narrow exceptions. Therefore, even if the espoused rule is merely a "short step" removed from existing precedent, this Court is prevented from granting habeas corpus relief. *See Caspari v. Bohlen*, 510 U.S 383, 114 S.Ct. 948, 957 (1994).

The requirement that a sentencing court must conduct a plenary evidentiary hearing, where the government must establish by a preponderance of the evidence that a defendant has actually committed the crime for which he was arrested prior to enhancing a sentence based on a new arrest, would "break new ground" as a matter of federal constitutional law. Although a number of circuits have held that hearings are necessary in some instances to resolve factual questions regarding the breach of a plea agreement, *see United States v. Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986)(hearing conducted to determine whether, in accordance with a plea agreement, defendant had been truthful before the Grand Jury); *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981)(no hearing necessary since defendant failed to present any evidence to controvert the state's claim that he did not abide by the terms of the agreement, therefore, presented no factual dispute for resolution); *United States v. Swinehart*, 614 F.2d 853, 858-59 (3d Cir. 1980) (hearing required since factual dispute existed as to whether the terms of the plea agreement had been altered by the state, and if altered, to determine what terms defendants' relied upon), no court, state or federal, has ever held that a sentencing court must always conduct a "mini-trial" on the subsequent arrest to ascertain its validity.

Equally unavailing is petitioner's alternate argument that his claim falls within the narrow exception announced in *Teague*,

namely, that the new rule alters a bedrock element of criminal procedure which implicates the fundamental fairness and accuracy of the trial (Pet. 19). *Teague v. Lane*, 489 U.S. at 311-12 (*citing Mackey v. United States*, 401 U.S. 667 (1971). This Court has characterized this exception as involving those procedures "implicit in the concept of ordered liberty" or procedures central to an accurate determination of innocence or guilt. *Butler v. McKellar*, 494 U.S. 407 (1990), 110 S.Ct. 1212, 1218 (*quoting, Teague v. Lane, supra*). These procedures have also been described as "watershed rules of criminal procedure." *Saffle v. Parks*, 494 U.S. 484, 505 (1990).

Petitioner's proposal for a mandated hearing is not a "watershed rule" of criminal procedure (Pet. 19). The validity of an arrest, used to enhance a sentence pursuant to a plea promise, is readily ascertainable by a variety of less time-consuming and equally effective means. As the District Court noted below, "a rule requiring a hearing to determine breach of a no-arrest agreement simply does not constitute the type of significant development in the law of criminal procedure for which the writ of habeas corpus was designed" (PA. 12a). The District Court also recognized that since sentencing procedures do not involve the determination of a defendant's guilt or innocence, but rather concerns the scope of punishment to be imposed, "a rule of sentencing procedure may never be significant enough to fall within the second exception" (PA. 12a) (*citing Teague v. Lane*, 489 U.S. at 288; *Graham v. Collins*, 506 U.S. 461, 113 S.Ct. 892, 903 [1993][rule requiring specific jury instructions regarding their evaluation of mitigating evidence during

sentencing in capital case did not fall within exception]; *Sawyer v. Smith*, 497 U.S. 227, 230-31 [1990][rule prohibiting prosecutor, during closing, from minimizing the role of jury in the decision to use capital punishment did not fall within exception]; *Saffle v. Parks*, 494 U.S. 484 [1990][rule prohibiting charging the jury not to consider sympathy for defendant did not fall within the exception]). Accordingly, petitioner has failed to present this Court with an issue worthy of its review.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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